



Materials for

LEGAL PROCESS (SECTION I)
FIRST YEAR 2002-2003

FALL 2002

VOLUME 1

**Professor Ayelet Shachar
Faculty of Law
University of Toronto**

The materials reproduced herein are solely for the educational use of students at the University of Toronto only, and are not for commercial sale or use.

Materials for

LEGAL PROCESS (SECTION I)

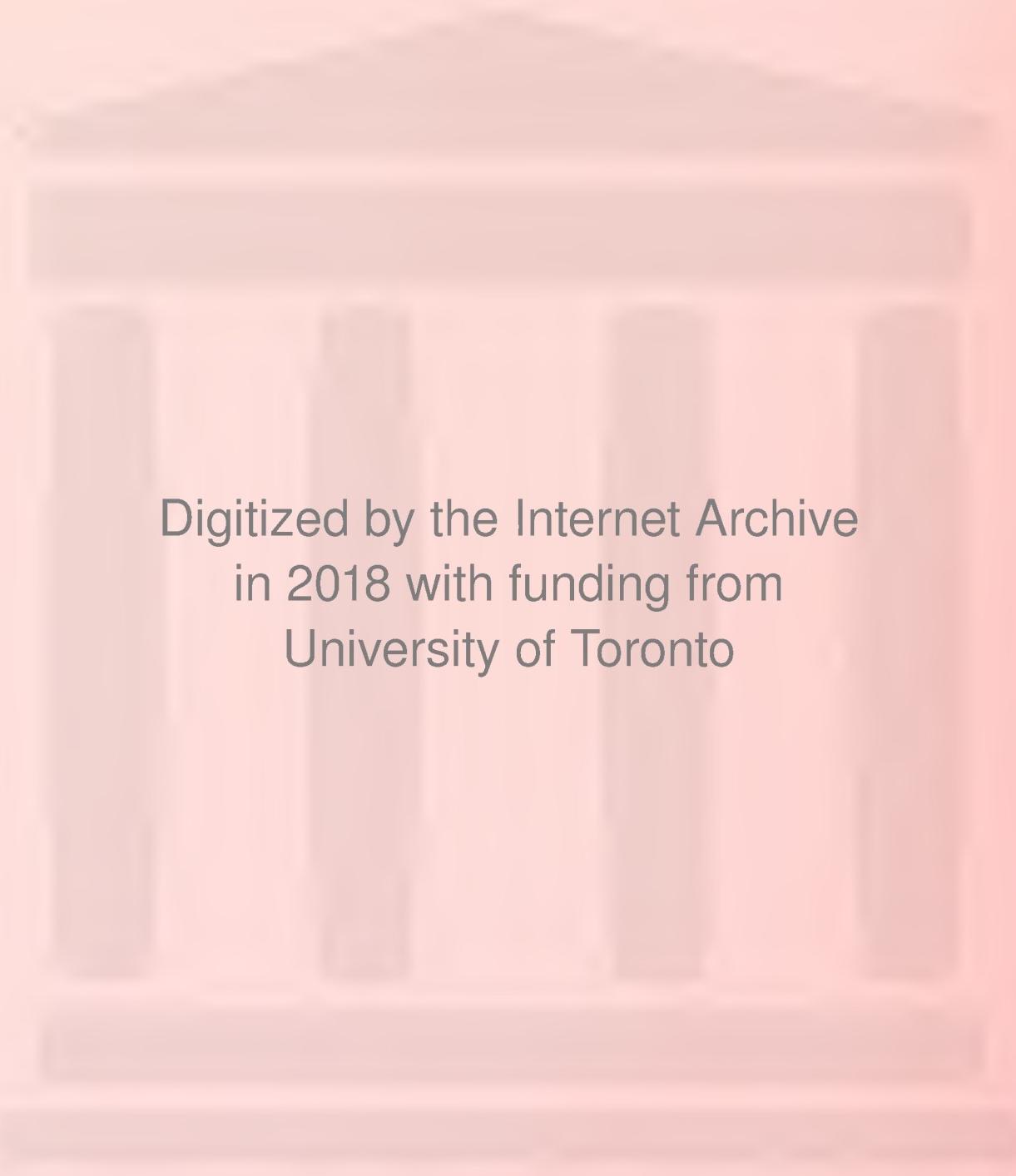
FIRST YEAR 2002-2003

FALL 2002

VOLUME 1

**Professor Ayelet Shachar
Faculty of Law
University of Toronto**

**The materials reproduced herein are solely for the educational use of students at the
University of Toronto only, and are not for commercial sale or use.**



Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

https://archive.org/details/materialsforlega01shac_0

LEGAL PROCESS
Professor Ayelet Shachar

1 Introduction to the common law system

1.2 Precedent; *stare decisis*; binding authority; persuasive authority

Gerald L. Gall, <i>The Canadian legal system</i> (Toronto: Carswell, 1995) c.10.....	1
<i>Halpern v. Canada</i> (A.G.), [2002] O.J. No. 2714.....	5
Claire Hoy, "Doing it democratically" <i>Law Times</i> (29 July 2002) 7	11
Janice Tibbetts, "Ottawa may scrap marriage laws" <i>The National Post</i> (27 July 2002) A1.....	12
Campbell Clark, "Ottawa to appeal same-sex ruling" <i>The Globe and Mail</i> (30 July 2002) A1.....	13
Eleanor Brown, "Why be wedded to gay marriage?" <i>The Globe and Mail</i> (8 August 2002) A17.....	16

Recommended:

<i>Chart of Ontario's Court System</i> in Garry D. Watson, <i>The civil litigation process: cases and materials</i> (Toronto: Edmond Montgomery, 1999) at 38	17
<i>Charts of Persuasive and Binding Authority in Comparative Context</i> in Gerald L. Gall, <i>The Canadian legal system</i> (Toronto: Carswell, 1995) at 182-186.	18
<i>EGALE Canada v. Canada</i> (A.G.), 2001 BCSC 1365.....	21

1.3 Philosophies of law and government; analytical frameworks

Purposive interpretation; positive law; legal realism; formalism; law and economics; anti-subordination approaches (critical legal studies, feminism, critical race theory)

Lon L. Fuller, "The Case of the Speluncean Explorers" (1999) 112 Harvard Law Review 1834.....	34
---	----

Recommended:

Ernest J. Weinrib, "Legal Formalism" in Dennis Michael Patterson, ed., <i>A Companion to Philosophy of Law and Legal Theory</i> (Cambridge, Mass.: Blackwell, 1999) 332	51
---	----

Nicholas Mercuro & Steven G. Medema, <i>Economics and the Law: from Posner to post-modernism</i> (Princeton, N.J.: Princeton University Press, 1997) at 5-25.....	56
---	----

Patricia J. Williams, <i>The alchemy of race and rights</i> (Cambridge, Mass.: Harvard University Press, 1991) at 146-148	66
---	----

1.4 Legal Reasoning

Catherine A. MacKinnon, <i>Sex Equality</i> (New York: Foundation Press, 2001) at 2-26.....	68
Allan C. Hutchinson, <i>The law school book: succeeding at law school</i> , 2nd ed. (Toronto: Irwin Law, 2000) at 25-38	74
<i>Law Society of British Columbia v. Andrews</i> , [1989] 1 S.C.R. 143.....	88
<i>Lavoie v. Canada</i> , 2002 SCC 23.....	90

2 The litigation process and the Rules of Civil Procedure

2.1 Parties to the litigation; amici curiae; standing; intervention

<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, r.13, amended to O. Reg. 206/02.....	100
<i>Borowski v. Canada (Minister of Justice)</i> (1983), 144 D.L.R. (3d) 657 (Sask. Q.B.).....	606-608 CLP
<i>Canadian Council of Churches v. Canada</i> , [1992] 1 S.C.R. 236.	480-490 CLP
Cristin Schmitz, "Intervenors set record, Supreme Court 'restrained' in 2000" <i>The Lawyers Weekly</i> 20:46 (13 April 2001) 7.....	101
Charles R. Epp, "Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms" (1996) 90:4 <i>American Political Science Review</i> 765	102

Recommended:

<i>Canadian Civil Liberties Association v. Canada (A.G.)</i> , [1998] O.J. No. 2856	106
---	-----

2.2 Where to litigate; jurisdiction and *forum non conveniens*

<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, r.17, amended to O. Reg. 206/02.....	128
John Jaffey, "Ontario Court of Appeal lays down eight-factor test to determine jurisdiction" <i>The Lawyers Weekly</i> 22:7 (14 June 2002) 1	150
Bill Miller & Christine Haughney, "Old Law Creates Forum for War-Crimes Trials" <i>The Toronto Star</i> (13 August 2000) B1	133
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978).....	152

Recommended:

Hague Conference, <i>Preliminary Draft Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters</i> (30 October 1999).....	135
<i>Carnival Cruise Lines v. Shute</i> , 499 U.S. 585 (1991).....	140

2.3 When to litigate; limitation periods

<i>Consumers Glass v. Foundation Company of Canada</i> (1985), 51 O.R. (2d) 385 (Ont. C.A.).....	296-301 CLP
Janet E. Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 University of Toronto Law Journal 169	159
<i>M.(K.) v. M.(H.)</i> , [1992] 3 S.C.R. 6.	302-312 CLP
Bill 10, <i>Limitations Act, 2002</i> , 3d. Sess., 37th Leg., Ontario, 2001 (1st reading 25 April 2001)	164
Recommended:	
Andrew T. Kenyon & Simon Mackenzie, <i>Recovering Stolen Art: Australian, English and US Law on Limitations of Action</i> (Public Law & Legal Theory Working Paper No. 23, Faculty of Law, University of Melbourne, 2002)	170

2.4 Multi-party litigation; joinder; counterclaims; cross-claims; third- party claims

<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, r.5, amended to O. Reg. 206/02	181
<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, r.27, amended to O. Reg. 206/02.....	184
<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, r.28, amended to O. Reg. 206/02.....	188
<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, r.29, amended to O. Reg. 206/02.....	192
<i>Teledata Communications v. Westburne Industrial</i> (1990), 71 O.R. (3d) 466 (H.C.).....	574-577 CLP
Roger C. Cramton, "Lawyer conduct in the Tobacco Wars" (2001) 51 DePaul Law Review 435.....	197
Marc Edge, "SLAPPed Down" National (Canadian Bar Association) (June-July 2000) 11.....	209

2.5 Class proceedings

<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, r.12, amended to O. Reg. 206/02.....	214
<i>Class Proceedings Act, 1992</i> , S.O. 1992, c. 6.....	217
Garry D. Watson, "Class Actions: The Canadian Experience" (2001) 11 Duke Journal of Comparative & International Law 269	241
Ontario Superior Court of Justice, <i>Notice of the Certification and Proposed Settlement of the Walkerton Class Action</i> (2001).....	251

<i>Anderson v. Wilson</i> , [1999] O.J. no. 2494 (C.A.)	625-633 CLP
<i>Nantais v. Telelectronics Proprietary</i> (1995), 25 O.R. (3d) 331 (Gen. Div), aff'd (Div. Ct.), at 347.....	638-641 CLP
Deborah Glendinning & Meredith Gardiner, "International Class Action: Fact or Fiction?" <i>The Lawyers Weekly</i> (7 June 2002) 17.....	252
<i>Hillick v. Toronto (City)</i> , 2001 SCC 68.....	254

Recommended:

Michelle Taruffo, "Some Remarks on Group Litigation in Comparative Perspective" (2001) 11 Duke Journal of Comparative & International Law 405	269
<i>Franklin v. University of Toronto</i> (2001), 56 O.R. (3d) 698.	278
<i>Rumley v. British Columbia</i> , 2001 SCC 69.....	293

2.6 Financing litigation; contingency fees; paralegals; insurance plans

Poonam Puri, "Financing of Litigation by Third-Party Investors: A Share of Justice?" (1998) 36 Osgoode Hall Law Journal 515	307
Cristin Schmitz, "Lobby for Contingency feeds, Ontario AG tells profession" <i>The Lawyers Weekly</i> 20:27 (17 November 2000) 1	315
Bill 25, <i>Solicitors Amendment Act (Contingency Fee Agreements)</i> , 2002, Ontario, 2002 (1st reading 16 May 2002)	317
"Private Insurance"	696-701 CLP
"Paralegals"	701 CLP
"Legal software"	707-709 CLP
Kirk Makin, "Legal turf war: courting the enemy" <i>The Globe and Mail</i> (10 June 2002) B8	320

Recommended:

<i>MacIntyre Estate v. Ontario</i> (A.G.) (2001), 53 O.R. (3d) 137	321
Peter deC. Cory, <i>A Framework For Regulating Paralegal Practice in Ontario: Executive Summary and Recommendations</i> (Ministry of the Attorney General, Ontario, Canada, 2000)	334

2.7 Access to justice

Kirk Makin, "A taste of life in the legal aid trenches" <i>The Globe and Mail</i> (8 July 2002) B9	348
David Gambrill, "Legal aid pay raise \$3 per hour" <i>Law Times</i> (29 July 2002) 1	349
Lucie E. White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G." (1990) 38 Buffalo Law Review 1	336

Stephen Ellman, "Client-Centredness Multiplied" (1992) 78 Virginia Law Review 1103 at 1104-1170.....	207-216 CLP
--	-------------

Recommended:

Kent Roach, "Fundamental Reforms to Civil Litigation in Ontario" in <i>Rethinking civil justice: research studies for the Civil Justice Review</i> (Toronto: Ontario Law Reform Commission, 1996) 395	351
---	-----

John D. McCamus, "The Reshaping of Legal Aid" in William A. Bogart, <i>Access to affordable and appropriate legal services in 2020</i> (Windsor, Ontario: Canadian Bar Association, 2000) 41.....	367
---	-----

2.8 Discovery; privilege and confidentiality

<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, r.30, amended to O. Reg. 206/02.....	380
---	-----

<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, r.31, amended to O. Reg. 206/02.....	388
---	-----

<i>Rules of Civil Procedure</i> , R.R.O. 1990, Reg. 194, r.34, amended to O. Reg. 206/02.....	397
---	-----

<i>Grossman v. Toronto General Hospital</i> (1983), 146 D.L.R. (3d) 280 (Ont. H.C.)	785-789 CLP
---	-------------

<i>Rainbow Industrial Caterers v. Canadian National Railway</i> (1986), 6 B.C.L.R. (2d) 268 (S.C.).....	819-820 CLP
---	-------------

<i>Smith v. Jones</i> , [1991] 1 S.C.R. 455.....	407
--	-----

Gavin MacKenzie, "Is keeping secrets in client's best interest?" <i>Law Times</i> (28 February 2000) 8.....	415
---	-----

Recommended:

Jonathan Harr, <i>A Civil Action</i> (New York: Vintage Books) at 149-193	417
---	-----

Cynthia Day Wallace, "Extraterritorial' Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment" (2002) 5 <i>Journal of International Economic Law</i> 353	442
--	-----

2.9 Settlement

Chris A. Carr & Michael R. Jencks, "The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision" (2000) 88 <i>Kentucky Law Journal</i> 183	451
---	-----

Owen M. Fiss, "Against Settlement" (1984) 98 <i>Yale Law Journal</i> 1073 at 1075-1090.....	250-254 CLP
---	-------------

"Agreement Between: The Grandview Survivors Support Group and the Government of Ontario"	254-257 CLP
--	-------------

Recommended:

- Donna Coker, "Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking" (1999) 47 UCLA Law Review 1 459

2.10 Alternative dispute resolution; mediation and negotiation

- Michael P. Silver, *Mediation and negotiation: representing your clients* (Markham, Ontario: Butterworths, 2001) at 3-14 488
- Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r.24.1, amended to O. Reg. 206/02 475
- Ann Kerr, "Mandatory mediation grows in popularity" *The Globe and Mail* (17 June 2002) B10..... 494
- Gail J. Cohen, "Mandatory mediation more likely to increase costs, not save money" *Law Times* (14 February 2000) 1..... 495
- Tracey Tyler, "Mandatory trend called 'a concern'" *The Toronto Star*..... 496

Recommended:

- Public Inquiries Act*, R.S.O. 1990, c. P-41, as amended by S.O. 2000, c. 14..... 483

3 The legal actors

3.1 Judges; the duty of impartiality

- Lennox v. Arbor Memorial Services* (2001), 56 O.R. (3d) 795..... 497
- Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995) 18 Dalhousie Law Journal 408 500

Recommended:

- Bertha Wilson, "Will Women Judges Really Make A Difference?" (1990) 28:3 Osgoode Hall Law Journal 507 508

3.2 Lawyers; professional and legal ethics

- Erin Anderssen, "Lawyers swoop to cash in on native claims" *The Globe and Mail* (10 July 1999) A1 517
- Janine Benedet, "When the Law Society is an ass" *The Globe and Mail* (15 November 1999) A17..... 519
- Duncan Kennedy, "The Responsibility of Lawyers for the Justice of Their Causes" (1987) 18 Texas Technical Law Review 1157..... 771-774 CLP

Rob Atkinson, "How the Butler Was Made to Do It: The Perverted Professionalism of The Remains of the Day" (1995) 105 Yale Law Journal 177 at 181-194.....113-119 CLP

Charles Fried, "The Lawyer as Friend: The Moral Foundations of Lawyer-Client Relations" (1976) 85 Yale Law Journal 1060 at 1060-1067, 1076-1087.119-129 CLP

Recommended:

"A fresh look at the Rules of Professional Conduct" *Ontario Lawyers Gazette* 4:3 (July-August 2000) 32..... 520

"Discipline Digest" *Ontario Lawyers Gazette* 5:3 (Summer 2001) 31 523

4 The new frontiers of civil procedure: beyond adversarial legalism; domestic, regional, and international justice

4.1 Beyond adversarial legalism

Jennifer J. Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice" (2002) 52 University of Toronto Law Journal 253..... 528

R. v. Moses (1992), 71 C.C.C. (3d) 347 (Y.T. Terr. Ct.) 538

Daniel Girard, "Teen bully finds justice, healing and the courage to apologize" *The Toronto Star* (15 May 2002) A7 547

Recommended:

Ed Morgan & Rachael Turkienicz, "The Roulette of Suffering" (2001) 9 Cardozo Journal of International and Comparative Law 297 at 314-319..... 548

4.2 Redefining domestic law; Challenging traditional jurisdictional boundaries

Joseph H.H. Weiler, *The constitution of Europe: "Do the new clothes have an emperor" and other essays on European integration* (New York: Cambridge University Press, 1999) at 39-43 568

Ayelet Shachar, *Multicultural jurisdictions: cultural differences and women's rights* (New York: Cambridge University Press, 2001) at 88-116..... 571

Recommended:

Minister of Indian Affairs and Northern Development, *Nisga'a Final Agreement in Brief* (Ottawa, 1999)..... 551

Nisga'a Final Agreement, signed on behalf of the Nisga'a Nation and Her Majesty in right of British Columbia on April 27, 1999 and on behalf of Her Majesty in right of Canada on May 4, 1999 and laid before the House of Commons on October 19, 1999, at paras. 39-40, 75-107..... 562

4.3 Supra-national institutions: “supreme” to the Supreme Court of Canada?

<i>Lovelace v. Canada</i> , UN GOAR, 36th Sess., Supp. No. 40, UN Doc. A/36/40 (1981)	587
<i>Baker v. Canada (Minister of Citizenship and Immigration)</i> , [1999] 2 S.C.R. 817	590
Simon Coldham, "Human rights in Botswana: Unity Dow v. Attorney-General" (1992) 36 Journal of African Law 91	594
Patrick Macklem & Ed Morgan, "Intervention at the Inter-American Court <i>Nexus: University of Toronto Faculty of Law alumni newsletter</i> (Spring 2002) 68	596
David Held, "What Hope for the Future?: Learning the Lessons of the Past" (2002) 9:2 Indiana Journal of Global Legal Studies 381	598

Recommended:

"Not (quite) strangled at birth: The International Criminal Court" <i>The Economist</i> 364 (6 July 2002) 14.....	608
Dierk Ullrich, "No Need for Secrecy? Public Participation in the Dispute Settlement System of the World Trade Organization" (2000) 34 University of British Columbia Law Review 55.....	610